SOONG KOK JONG v. AHMAD TARMIZI ADNAN

HIGH COURT MALAYA, SHAH ALAM
SURAYA OTHMAN J
[CIVIL APPEAL NO: 12B-167-05-2014]
15 APRIL 2015

TORT: *Negligence – Road accident – Collision between defendant's motorcycle and plaintiff who was pushing a bicycle while crossing road – Liability – Sessions Court's finding that defendant 100% liable towards plaintiff – Appeal against – Whether plaintiff kept proper look out for approaching vehicles – Failure to use pedestrian crossing footbridge located 200 meters away – Non-compliance of rr. 69 & 73 of Highway Code – Road Transport Act 1967, s. 68(3) – Whether invoked – Whether plaintiff breached duty of care towards himself*

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On 13 February 2011, at about 12 midnight, the plaintiff was crossing a road while pushing his bicycle on Jalan Batu 18 Rawang *ie*, KL-Ipoh (Rawang) route. The plaintiff testified that he looked left and right before crossing the road and that he did not see any approaching vehicle. He later said that he did not see the defendant's motorcycle because it was driven too fast. According to the plaintiff, the collision occurred when he had nearly arrived at the other end of the road. The plaintiff averred that the accident occurred solely due to the negligence of the defendant. The defendant denied that his motorcycle WTV 1514 was involved in the accident with the plaintiff and also denied that he was present at the scene of the accident. The defendant further argued that it was the plaintiff who was responsible for the accident since the plaintiff refused to use the pedestrian crossing footbridge that was located 200 metres away from the site of the collision and thus the plaintiff had put himself at risk by crossing the road when it was unsafe to do so. The Sessions Court Judge ('SCJ'), gave judgment for the plaintiff and found the defendant 100% liable. Dissatisfied with the decision of the SCJ, the defendant appealed on the ground of liability only.

Held (allowing defendant's appeal):

(1) SP1 testified that he had seen the motorcycle with the plate number WTV 1514 while he was resting at the side of the road after the collision. SP3 testified that when she came to the scene of the accident, she saw the plaintiff's bicycle broken into two and a motorcycle beside

A the plaintiff with the registration number WTV 1514. From the evidence of the witnesses SP1, SP2, SP3, SD1 and SD2, the SCJ was correct in her findings that there was no doubt that the motorcycle that collided into the plaintiff was none other than the motorcycle bearing registration number WTV 1514. This was so since SP1 and SP3 had positively B identified the motorcycle's registration number on their own accord without being told by third parties. (paras 17 & 18)

(2) SP1 and SP3 had identified the motorcyclist whom they described as a Malay man who had driven the motorcycle bearing registration number WTV 1514. There was no doubt that the defendant was the owner of the C said motorcycle on 13 February 2011, the date of the accident. This was admitted so by the defendant himself (SD1) and SD2; that SD1 was the owner of the motorcycle on 13 February 2011 and that SD2 only took ownership of the said motorcycle on 25 February 2011 when SD1 sold the motorcycle to him. As such the SCJ's finding that the defendant had D collided into the plaintiff and his bicycle was correct. (paras 20-22)

(3) The plaintiff in his evidence stated that he did not see the presence of any motorcycle but at the same time testified that the defendant's motorcycle was driven at a high speed. This statement was an implied admission on the part of the plaintiff that he did not keep a proper look E out for approaching vehicles before crossing the road. Even though the accident occurred at the end of the road, if he had kept a proper look out, he would have noticed the motorcycle because the motorcycle could not have appeared out of nowhere. (paras 24, 25 & 28)

(4) The plaintiff had breached his duty of care towards himself by not F complying with rr. 69 and 73 of the Highway Code in not using the pedestrian crossing foot-bridge which was located 200 meters away but instead took the risk of endangering himself by crossing a poorly lit road at dead midnight. Section 68(3) of the Road Transport Act 1967 could thus be invoked by the defendant to rely on the failure of the plaintiff G to use the said foot-bridge to establish liability against him. The plaintiff had breached his duty to comply with rr. 69 and 73 of the Highway Code in failing to exercise proper care and attention before crossing, especially when it was dead midnight and the road was poorly lit. (paras 34, 37 & 39)

H **(5)** A motorist (the defendant) owes a duty of care to other road users. However, in this instant case, the defendant might not be in a position to see a pedestrian who is crossing a poorly lit road at midnight. Thus, the plaintiff knowing the apparent danger that he put himself into by crossing the road, had contributed to the accident. Therefore, the finding I of a 100% liability of the SCJ was flawed since she had not considered the contribution on the part of the plaintiff in the accident.The liability should be apportioned at 50:50. (paras 40, 42 & 46)

Case(s) referred to:

Commercial Union Assurance (M) Sdn Bhd v. Ng Chek Hung & Another Appeal [1997] 3 CLJ 189 CA ***(refd)***

Fardon v. Harcourt-Rivington [1932] All ER Rep 81 ***(refd)***

Hitam Abdullah & Anor v. Kok Foong Yee (F) & Anor [1973] 1 LNS 48 PC ***(refd)***

Hussaina Rani Naina Mohamed v. Ahmad Nadzri Kamaruddin & Anor [1997] 3 CLJ 500 CA ***(refd)***

Muir v. Glasgow Corporation [1943] AC 448 ***(refd)***

Ong Kim Hai v. Kusaini Surip [1984] 2 CLJ 281; [1984] 1 CLJ (Rep) 310 FC ***(refd)***

Siti Aisha Ibrahim v. Goh Cheng Hwai [1982] CLJ 544; [1982] CLJ (Rep) 326 FC ***(refd)***

Legislation referred to:

Highway Code, rr. 69, 73

Road Transport Act 1987, s. 68(3)

For the plaintiff - John Kanagarajah; M/s Kanagarajah & Co

For the defendant - Raj Kumar; M/s Thomas, Bala & Assocs

[Appeal from Session Court; Suit No: A53-123-06-2013]

Reported by Suhainah Wahiduddin

JUDGMENT

Suraya Othman J:

Introduction

[1] This is an appeal by the defendant against the decision of the learned Session Court Judge ("SJ"). In her decision, the learned SJ gave judgment for the plaintiff and found the defendant 100% liable. The defendant, unhappy, appealed against the decision of the SJ on the issue of liability only. I heard the appeal and allowed liability to be apportioned 50:50. The defendant, still dissatisfied appealed against my decision.

Brief Facts

[2] On 13 February 2011 at about 12.00 midnight, the plaintiff was crossing a road while pushing his bicycle. It was at Jalan Batu 18 Rawang ie, KL-Ipoh (Rawang) route. The plaintiff crossed from right to left, ie, from A2 to A1.

[3] According to the plaintiff (SP1) the collision occurred when he had nearly arrived at the other end of the road and he marked the point of impact as "X" in the sketch plan.

[4] The plaintiff testified that he looked left and right before crossing the road and he did not see any approaching vehicle. He later then said that he did not see the defendant's motorcycle because it was driven too fast. He said that there was a traffic light located near the road.

[5] The plaintiff averred in his statement of claim that the accident occurred solely due to the negligence of the defendant.

[6] In the statement of defence and at trial, the defendant denied that his motorcycle WTV 1514 was involved in the accident with the plaintiff. The defendant also denied that he was present at the scene of the accident.

[7] According to the investigation officer (SP2), there was a pedestrian crossing footbridge about 200 metres from the site of collision. According to SP2 the plaintiff was knocked down by a motorcycle allegedly driven by the defendant.

Submissions By Parties

The plaintiff was represented by Mr John Kanagarajah while the defendant by Mr Raj Kumar.

[8] The defendant submitted that he did not drive the said motorcycle on that day and was neither involved in the accident nor was at the scene of the accident.

[9] The defendant argued that it is the plaintiff who is responsible for the accident since the plaintiff refused to use the pedestrian crossing footbridge that was located 200 metres away from the site of the collision and thus the plaintiff had put himself at risk by crossing the road when it was unsafe to do so. The defendant referred to rr. 69 and 73 of the Highway Code.

[10] The plaintiff on the other hand submitted that it was a norm for pedestrians to cross the road without using the pedestrian crossing footbridge. This is especially so when he had to push his bicycle which made it not practical for him to use the said footbridge.

[11] The plaintiff also testified that he was already near the other side of the road when he was collided into by the said motorcycle.

Evidence Of Witnesses

[12] According to the plaintiff, (SP1):

(a) He saw the motorcycle with the plate number, WTV 1514 while he was resting at the side of the road after the collision. He testified that he looked left and right before crossing the road;

(b) In cross-examination, he said he did not see the motorcycle because it must have been driven very fast to have knocked him down;

(c) At question 23, in cross-examination, he said that the motorcycle was a black Honda (p. 11 supplementary appeal record);

(d) He informed the court that he and the motorcyclist was brought to the Selayang Hospital by an ambulance;

(e) Further, he admitted that it was dangerous for him to cross the highway and that he was taking a risk in doing so.

[13] According to the plaintiff's step-sister, Miss Lim Siew Yong (SP3):

(a) She went to the scene of the accident and found the plaintiff with his leg injured, a Malay man lying on the road and a Malay woman also injured;

(b) She saw her brother's bicycle broken into two and a motorcycle beside her brother with the registration number WTV 1514;

(c) She testified that her brother, the Malay man and woman and the Malay man's friend was taken to the hospital in an ambulance;

(d) The next day she went to the hospital to visit her brother and found the said Malay man lying next to her brother. She then made a police report on the following day;

(e) She further testified in cross-examination that she was at the scene of the accident for 15 minutes before the ambulance came to take the injured to the hospital;

(f) She maintained that it was not her brother who had told her about the registration number of the motorcycle but that she saw it herself since the motorcycle was lying next to her brother on the night of the accident.

[14] According to the investigation officer, Sarjan Zine Sidek (SP2):

(a) There were two police reports made; by SP1 and SP3. The driver of the motorcycle WTV 1514 did not make any police report and he issued a notice to him;

(b) Through his investigation, the accident involved the plaintiff and his bicycle and a motorcycle with registration number WTV 1514 allegedly driven by the defendant;

(c) The road where the accident occurred is a main road in town and not a highway. The road was poorly lit ("samar-samar");

(d) There is no traffic light in the area but there is a pedestrian crossing footbridge located about 200 meters away from the place of accident. He agreed that a bicycle can cross the road but has to be very careful in doing so.

[15] The defendant, Encik Ahmad Tarmizi (SD1) testified:

(a) That on the date of the accident, 13 February 2011, he was still the owner of motorcycle, registration number WTV 1514;

(b) He denied being involved in any road accident or giving permission to anyone to drive the said motorcycle;

(c) He did not receive any notice from the police about the accident;

(d) He sold the said motorcycle on 25 May 2011 to SD2 but has no proof of the sale;

A (e) He was informed about the accident and wanted to make a police report but was disallowed from doing so by two men from the insurance company (a Malay and an Indian Muslim man). However, SD2 was allowed to make the police report by the insurers.

[16] Encik Haron Jaapar (SD2) confirmed:

B

(a) That he bought the said motorcycle on 25 May 2011 from the defendant (SD1) but has no documentary proof that he did so;

(b) He was not the owner of the said motorcycle on 13 February 2011, the date of the accident;

C

(c) He made a police report on 30 September 2013 after he made a statutory declaration (D5). He did so after being instructed to do so by the insurance company. He has no knowledge of the accident.

[17] From the evidence of SP1, SP2, SP3, SD1 and SD2, the SJ was correct D in her findings that there was no doubt that the motorcycle that collided into the plaintiff was none other than the motorcycle bearing registration number WTV 1514. This is so since SP1 and SP3 had positively identified the motorcycle's registration number on their own accord without being told by third parties.

E **[18]** The plaintiff (SP1) testified that he saw the motorcycle with the plate number, WTV 1514 while he was resting at the side of the road after the collision. SP3 testified that when she came to the scene of the accident, she saw her brother's bicycle broken into two and a motorcycle beside her brother with registration number WTV 1514. She maintained that it was not F her brother who told her the registration number of the motorcycle but that she saw it herself since the motorcycle was lying next to her brother on the night of the accident.

[19] She was at the scene of the accident for about 15 minutes before an ambulance took her brother, the motorcyclist, a Malay woman and another G Malay man to Selayang Hospital.

[20] Both SP1 and SP3 gave evidence that the motorcyclist was a Malay man who was injured due to the accident. SP3 again saw the motorcyclist the next day when she visited her brother in Selayang Hospital.

H **[21]** Thus SP1 and SP3 had identified the motorcycle whom they described as a Malay man who had driven the motorcicle bearing registration number WTV 1514.

[22] The SJ stated at para. 37 of her judgment that there was no doubt that the defendant was the owner of the said motorcycle on 13 February 2011, I the date of the accident. This was admitted so by the defendant himself (SD1) and SD2; that SD1 was the owner of the motorcycle on 13 February 2011 and that SD2 only took ownership of the said motorcycle on 25 May 2011 when SD1 sold the motorcycle to him.

[23] Further, the SJ queried why there was no explanation from SD1 and SD2 as to the whereabouts of the said motorcycle from 13 February 2011 to 25 May 2011.

[24] The statutory declaration by SD2 that he did not lend or allow anyone to use the motorcycle or that the said motorcycle was not involved in any accident is of no relevance or value since he was not the owner of the motorcycle at the time of the accident. The defendant (SD1) was still the owner at the material date.

[25] As such the SJ's finding that the defendant had collided into the plaintiff and his bicycle is correct.

[26] The question here is whether the SJ is correct in her finding of a 100% liability against the defendant.

[27] According to the plaintiff, he has nearly completed crossing the road when he collided into by the defendant. The defendant completely denied being involved in the accident. The SJ at para. 32 of her judgment made a finding that the accident occurred when the said motorcycle collided into the plaintiff who was crossing the road while pushing his bicycle. On that basis, and finding that the defendant was involved in the accident, without further ado, she found the defendant to be 100% liable.

[28] The plaintiff in his evidence stated that he did not see the presence of any motorcycle but at the same time testified that the defendant's motorcycle was driven at a high speed. This statement, to my mind, is an implied admission on the part of the plaintiff that he did not keep a proper look out for approaching vehicles before crossing the road. Even though the accident occurred at the end of the road, if he had kept a proper lookout, he would have noticed the motorcycle because the motorcycle could not have appeared out of nowhere.

[29] It must be noted that the accident occurred at about 12 midnight and according to the investigation officer (SP2), the road was poorly lit ("samar-samar"). SP2 also testified that there was no traffic lights located at the road as alleged by the plaintiff. SP2 also stated that it was dangerous to cross the road and one has to be extremely careful if one wants to do so. Plaintiff admitted that it was dangerous for him to cross the road but still took the risk to do so.

[30] The investigation officer, SP2 then informed the court that there was a pedestrian crossing footbridge located about 200 meters away from the place of accident.

[31] In the presence of a pedestrian crossing footbridge, is it incumbent on the plaintiff to use it, instead of crossing the road?

[32] Under s. 68(3) of the Road Transport Act 1987 (Act 333) it provides:

> Failure on the part of any person to observe any provisions of the highway code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may in any proceedings, whether civil or criminal, can be relied on by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings.

[33] Under Part 1V of the Highway Code, which part deals with the conduct of pedestrians, rr. 69 and 73 state:

> Rule 69 Highway Code
>
> You must not cross a road within 200 yards of a pedestrian crossing footbridge or subway. The correct place to cross a street is at an intersection or at a marked pedestrian crossing. It is worthwhile going out of your way a little to cross at these points than to risk death or injury by attempting to cross at other places amidst heavy traffic. Always cross the road by the shortest possible route, i.e. from one side to the other.
>
> Rule 73 Highway Code,
>
> Before you risk crossing the road in front of an approaching motor vehicle remember that although you can stop in the space of a yard a motor vehicle requires a considerable distance for the driver to react and operate his brakes. A car travelling at a speed of 60 m.p.h requires a distance of approximately 300 feet in which to stop and if the road is wet, considerably longer.

[34] Thus the plaintiff had breached his duty of care towards himself by not complying with r. 69 and r. 73 of the Highway Code in not using the pedestrian crossing footbridge which was located about 200 meters away but instead took the risk of endangering himself by crossing a poorly lit road at dead midnight. Section 68(3) of the Road Transport Act 1967 can thus be invoked by the defendant to rely on the failure of the plaintiff to use the said footbridge to establish liability against him.

[35] In the case of the House of Lords in *Muir v. Glasgow Corporation* [1943] AC 448, Lord Macmillan said this:

> The degree of care for the safety of others which the law requires human beings to observe in the conduct of their affairs varies according to the circumstances. There is no absolute standard, but it may be said generally that the degree of care required varies directly with the risk involved.

[36] In *Fardon v. Harcourt-Rivington* [1932] All ER Rep 81, Lord Dunedin said:

> The root of this liability is negligence and what is negligence depends on the facts with which you have to deal. If the possibility of the danger emerging is reasonably apparent, then to take no precautions is

> negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having take extraordinary precautions.

[37] To my mind, this is basically a case of road crossing by the plaintiff when it was unsafe to do so. In the Federal Court's decision on road crossing, *Siti Aisha Ibrahim v. Goh Cheng Hwai* [1982] CLJ 544; [1982] CLJ (Rep) 326; [1982] 2 MLJ 124 (FC), the facts as disclosed by the headnotes are as follows:

> In this case in an action for damages the President Sessions Court Penang found that the respondent the driver of a car was negligent and that the appellant was guilty of contributory negligence. The evidence revealed that the respondent has seen the appellant an old lady some thirty feet away about to cross the road. The learned President found in effect that the respondent was negligent in failing to take precautions and that the appellant herself was not free from blame when she attempted to cross the road without fully ascertaining that it was safe to do so. He apportioned the liability at 50:50. On appeal, Arulanandom J allowed the appeal and ordered that the appellant's claim be dismissed with cost. The appellant appealed.

[38] The Federal Court, on appeal, agreed with the decision of the President and state:

> The learned President, in our view, correctly found as a fact that the respondent was negligent and that the appellant was herself not free from blame when she attempted to cross the road without fully ascertaining that it was safe to do so. We see no valid reason to hold that the apportionment of liability 50:50 was unwarranted by the evidence. For these reasons, we allowed the appeal with costs and restored the order made by the learned President. (See also the case of *Letchumay a/p Palaniappan v. Mahalingam a/l Subramaniam & Anor* (2012) 7 CLJ 271), another road crossing case where the Judge apportioned liability at 70:30.

[39] In the circumstances of this instant case, the plaintiff had breached his duty to comply with rr. 69 and 73 of the Highway Code in failing to exercise proper care and attention before crossing, especially when it was dead midnight and the road was poorly lit.

[40] It is indisputable that a motorist (defendant) owes a duty of care to other road users. However in this instant case, the defendant might not be in a position to see a pedestrian who is crossing the road since, as I have stated before, it is midnight and the road is poorly lit. Thus the plaintiff, knowing the apparent danger that he put himself into by crossing the road, had contributed to the accident.

[41] The plaintiff, as I have stated before, should have used the pedestrian crossing footbridge that was located about 200 meters away. The plaintiff knew that it was a dangerous feat to cross the road while pushing his bicycle and had himself to blame for courting danger and thus partly contributed to the accident.

[42] Therefore, the finding of a 100% liability of the SJ is flawed since she has not considered the contribution on the part of the plaintiff in the accident.

[43] I am very much aware that an appellate tribunal should be slow in interfering with a finding of fact of the trial court which had observed the demeanour and heard the witnesses before coming to its conclusion (*Hussaina Rani Naina Mohamed v. Ahmad Nadzri Kamaruddin & Anor* [1997] 3 CLJ 500; [1997] 2 MLJ 534, COA; *Commercial Union Assurance (M) Sdn Bhd v. Ng Chek Hung & Another Appeal* [1997] 3 CLJ 189; [1997] 2 MLJ 465 and *Hitam Abdullah & Anor v. Kok Foong Yee (F) & Anor* [1973] 1 LNS 48; [1974] 1 MLJ 193, Privy Council referred to).

[44] But as stated earlier, from the evidence adduced, especially the admission of the plaintiff that he took a risk knowing the apparent danger that he put himself to, the poorly lit road and the presence of a pedestrian crossing footbridge about 200 meters away which the plaintiff should have used but did not; it can be clearly deduced that the SJ had erred in coming to the conclusion that the defendant is 100% liable.

[45] I am guided by the approach taken by the Federal Court in *Ong Kim Hai v. Kusaini Surip* [1984] 2 CLJ 281; [1984] 1 CLJ (Rep) 310; [1984] 2 MLJ 28, where the court states:

> The approach to the exercise of the power available to an appellate court is as stated by Lord Denning MR in *Kerry v. Carter* [1969] 1 WLR 1372 where he said:
>
> > I think that the attitude of this court was correctly stated in that case (*Brown v. Thompson* [1968] 1 WLR 1003 at p. 1012, by Admund Davies LJ when he quoted from the judgment of Sellers LJ in *Qunitas v. National Smelting Board* [1961] 1 WLR 401 409). The court adopts in regard to apportionment the same attitude as it does to damages. We will interfere if the judge has gone wrong in principle or is shown to have misapprehended the facts; but, even if neither of these is shown, we will interfere if we are of opinion that the judge was clearly wrong.

[46] On that note, and since the plaintiff had nearly completed crossing to the other side of the road when the accident occurred, liability should be apportioned at 50:50.

Conclusion

[47] For the reasons above, I allowed the defendant's appeal and set aside the SJ's decision. I orderred that liability be apportioned 50% against the defendant and 50% against the plaintiff.

Costs

[48] Mr Raj Kumar prayed for costs of RM5,000 while Mr John Kanagarajah prayed for costs of RM2,000. In the circumstances, I feel costs of RM3,500 is fair and adequate. Deposit to be refunded to the defendant/appellant.

Appeal allowed with costs RM3,500